Filed 3/19/13

**CERTIFIED FOR PARTIAL PUBLICATION***

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| In re Marriage of PAUL and JEANETTE LEE BENDETTI. | B228045<br><br>(Los Angeles County Super. Ct. No. ED008213) |
| PAUL BENDETTI,<br><br>Respondent,<br><br>v.<br><br>JEANETTE LEE BENDETTI,<br><br>Respondent;<br><br>PATRICIA GUNNESS,<br><br>Appellant. | |

APPEAL from an order of the Superior Court of the County of Los Angeles, David S. Cunningham, III, Judge. Affirmed.

Law Offices of Marjorie G. Fuller, Marjorie G. Fuller and Lisa R. Wiley for Appellant; Patricia Gunness in pro. per.

Law Offices of David S. Karton, David S. Karton for Respondent Jeanette Lee Bendetti.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of **DISCUSSION II, III, and IV.**

No appearance for Respondent Paul Bendetti.

## INTRODUCTION

In connection with dissolution proceedings, the husband's first wife alleged, inter alia, that the husband fraudulently transferred property to the husband's second wife. The first wife joined the second wife as a third party to the dissolution proceedings and moved for attorney fees pendente lite against the husband and the second wife, which fees the trial court awarded. We hold that the trial court had the discretion to award attorney fees pendente lite against the third party—the second wife—pursuant to Family Code section 2030, subdivision (d)[1] without regard to whether the moving party demonstrated a likelihood of success on the merits or whether there was a prima facie case linking the second wife to issues in the proceeding. We therefore affirm the order with a modification.

## BACKGROUND[2]

In November 1993, Paul Bendetti and his first wife Jeanette Bendetti[3] entered into a marital settlement agreement (MSA) that divided the couple's property and provided for spousal support for Jeanette. In May 1994, a judgment of dissolution ending Paul and Jeanette's marriage was entered. Among the community property the MSA divided was the couple's 50 percent interest in two restaurants, Library I and Library II, that they owned with Peter DeLamos. The MSA stated that DeLamos indicated a willingness to purchase Jeanette and Paul's interest in Library I and Library II for $400,000, less an

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[1] All statutory references are to the Family Code unless otherwise noted.

[2] Appellant Patricia Gunness (Gunness), Paul Bendetti's second wife and the third party to this proceeding, moved to augment the record on appeal with the reporter's transcripts for the hearings on July 26 and 27, 2010, August 25 and 26, 2010, and October 28, 2010. Those hearings concern the award of attorney fees under section 2030, and are referenced in the January 19, 2011, written order awarding attorney fees. We grant Gunness's motion to augment the record on appeal.

[3] For clarity, we refer to Paul and Jeanette by their first names.

amount to satisfy a tax liability due the Internal Revenue Service. The remaining balance of the purchase price was to be divided equally between Jeanette and Paul. DeLamos was to execute a promissory note to Jeanette for her half share, the proceeds of which were to be paid in equal monthly installments over a 10 year period at 10 percent interest. Paul was to receive his half share upon consummation of the sale of the restaurants to DeLamos.

Jeanette claims that she never received a promissory note from DeLamos. She acknowledges that for a few years after her divorce, she received occasional funds from DeLamos, generally in the amount of $1,500, but claims that when she asked him why he was sending her payments, he responded that he was doing it to help her out because she had not been treated well in her divorce.

Under the MSA, Jeanette was to receive $1,500 in monthly spousal support from Paul. Paul failed to pay all of the spousal support to which Jeanette was entitled. In 2006, Jeanette began efforts to recover the support Paul owed. During those efforts, Jeanette learned that Paul and Gunness, Paul's second wife, were involved in litigation with Dennis Mastro and others in connection with the investment in the Beverly Hills Steakhouse (Mastro litigation).

In the Mastro litigation, Paul contended that he invested $750,000 in the Beverly Hills Steakhouse. In his deposition in that action, Paul testified that Gunness signed the operating agreement for the Beverly Hills Steakhouse. According to Paul, he had an agreement with Mastro that he and Mastro would be partners on a 25/75 percent basis in all California Mastro restaurants. Thus, the "real agreement" was contrary to the written agreement, presumably in that he, rather than Gunness, was the real party to the investment agreement. Gunness testified, in effect, that the restaurant had been put in her name as a nominal party because of her connections. In his deposition, Paul also testified that DeLamos owed him money for the sale of one of the restaurants and agreed to pay part of it by applying it to Paul's required capital contribution for the Beverly Hills Steakhouse ownership.

Jeanette filed a judgment lien in the Mastro litigation. In June 2007, the Mastro litigation was settled with a payment of $7.25 million to Gunness, apparently without regard to the lien.

A few months later, Paul paid Jeanette $271,000 with funds from Gunness to settle Jeanette's claim against him for spousal support. Jeanette then moved to recover $31,693.59 in attorney fees incurred in recovering her spousal support. Paul responded that he was unable to pay the attorney fees as his income was $950 a month in social security retirement benefits and he had no assets. Paul, in this proceeding, claimed that Gunness was the investor in the Beverly Hills Steakhouse, that he never received distributions or income from the restaurant, and that there was no agreement with Gunness that he would share in the restaurant investment or in any recovery from the Mastro litigation. Jeanette replied that Paul had an interest in the Mastro litigation and caused the settlement proceeds to be transferred fraudulently to Gunness.

In July 2008, Gunness brought a declaratory relief action against Jeanette in federal court seeking an adjudication that all of the proceeds of the Mastro litigation belonged to her. Jeanette moved successfully to have Gunness's federal court action dismissed.

In August 2008, Jeanette moved to join Gunness as a party to the dissolution proceeding, which motion was granted. Jeanette then filed a complaint in joinder in the dissolution proceeding for actual fraudulent transfers, constructive fraudulent transfers, declaratory relief, and unjust enrichment. Gunness filed a demurrer to the complaint and a motion to strike a portion of the complaint. In March 2010, Jeanette amended the complaint, and alleged causes of action for declaratory relief and actual and constructive fraudulent transfers under the Uniform Fraudulent Transfer Act (Civ. Code, § 3439 et seq.) and common law.

In March 2010, Jeanette moved to recover $223,090.98 in attorney fees pendente lite from Paul and Gunness for work performed through January 31, 2010, that she incurred to enforce the spousal support agreement, to join Gunness to the dissolution proceeding, to prepare an omitted asset motion, and to defend against Gunness's federal

court declaratory relief action. Jeanette also sought another $100,000 for work to be performed.

The trial court stated that Gunness and Paul's position was that Jeanette's claim for an interest in the Mastro litigation settlement was a sham. The trial court reasoned that it should not deny Jeanette's request for attorney fees on the basis that her claim might be without merit because it had not yet reached the merits of Jeanette's claim. The trial court said that until reaching the merits, it was inclined to make sure that both sides had attorney representation. The trial court expressed that it was critical to reach the merits of Jeanette's underlying claim.

The trial court granted Jeanette's attorney fees request in part, awarding her an initial amount of $50,000, and continued the hearing to consider further the attorney fees issue. The parties argued various issues related to Jeanette's attorney fees motion, and the trial court awarded Jeanette additional attorney fees. Of Jeanette's request for $223,090.98 for work performed, the trial court awarded her $131,750, which award consisted of the following (and included the previously awarded $50,000 spread among the categories): $30,000 for opposing Gunness's demurrer and motion to strike; $30,000 for an omitted asset motion; $45,750 for Jeanette's efforts to take Gunness's deposition and her defense of Gunness's federal court declaratory relief action; and $26,000 for joining Gunness to the dissolution proceeding and meeting and conferring on various sets of written discovery. The trial court denied Jeanette's request for $100,000 for work to be performed. Gunness appeals.[4]

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[4] On July 27, 2010, and August 26, 2010, the trial court awarded Jeanette a total of $131,750 in attorney fees from Paul and Gunness, jointly and severally. Gunness filed a notice of appeal on October 6, 2010, with respect to the trial court's August 26, 2010, attorney fees award. On October 28, 2010, the trial court issued a minute order stating that $50,000 of the attorney fees award was effective as of July 27, 2010, and $81,750 of the fee award was effective October 28, 2010. A written order awarding attorney fees was entered on January 19, 2011. Gunness has moved to deem her notice of appeal (which she incorrectly describes as having been from the trial court's October 28, 2010, minute order) immediately filed after the January 11, 2011, order was entered. Jeanette

## DISCUSSION

### I. The Trial Court's Order That Gunness Pay Jeanette's Attorney Fees Pursuant To Section 2030, Subdivision (d)

Gunness contends that fundamental fairness and public policy require that a party to a dissolution proceeding seeking attorney fees from a third party pursuant to section 2030, subdivision (d)[5] demonstrate a likelihood of success on the merits and a prima facie case linking the third party to an issue in the proceeding. Gunness contends that there was no such factual showing in this case and only Jeanette's bare allegations and therefore the trial court erred in ordering her to pay Jeanette's attorney fees.

The purpose of an attorney fees award in a marital dissolution proceeding is to provide, as necessary, one of the parties with funds adequate to properly litigate the matter. (*In re Marriage of Sullivan* (1984) 37 Cal.3d 762, 768.) The party seeking an award of need-based attorney fees has the burden of establishing need. (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 824.)

In deciding whether to award attorney fees, the trial court considers the parties' respective needs and incomes, including their assets and liabilities. (*In re Marriage of Sullivan, supra,* 37 Cal.3d at p. 768; § 2032.) A motion for attorney fees is left to the trial court's sound discretion and will not be disturbed on appeal absent a clear showing of abuse. (*In re Marriage of Sullivan, supra,* 37 Cal.3d at pp. 768-769.) "'[T]he trial court's order will be overturned only if, considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order made. [Citations.]' [Citation.]" (*Id.* at p. 769.) Under section 2030, subdivision (d), the trial

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does not oppose the motion. We grant Gunness's motion. (Cal. Rules of Court, rule 8.104(d)(1).)

[5] Section 2030, subdivision (d) states, "Any order requiring a party who is not the spouse of another party to the proceeding to pay attorney's fees or costs shall be limited to an amount reasonably necessary to maintain or defend the action on the issues relating to that party."

court, in its discretion, may award attorney fees in a dissolution proceeding against a third party—i.e. one joined but not a spouse.

In *In re Marriage of Siller* (1986) 187 Cal.App.3d 36, a marital dissolution proceeding, the husband owned 40 percent of the shares in a family corporation and a 50 percent interest in a family partnership. (*Id*. at p. 41.) During the marriage, 23 parcels of real estate were acquired with title taken in the names of the husband, the wife, one of the husband's brothers, and the brother's wife. (*Ibid.*) In the dissolution proceeding, the wife took the position that she owned a one quarter interest in the 23 parcels of real property. (*Id.* at pp. 41-42.) The partnership alleged that it paid the purchase price of the 23 parcels from its own funds, and filed an action seeking to impose a purchase money resulting trust in its favor on the properties. (*Ibid.*) The wife then joined the partnership and the corporation as parties in the dissolution proceeding. (*Id.* at p. 42.) The wife claimed that she had a community property interest in property claimed by the partnership and a beneficial interest in properties acquired by the corporation with community funds. (*Ibid.*)

Before trial, the wife moved for an award of attorney fees from the partnership and the corporation. (*In re Marriage of Siller*, *supra*, 187 Cal.App.3d at p. 42.) The wife claimed that she had been forced to resist numerous unsuccessful motions to block discovery and that she successfully resisted a motion for judgment on the pleadings and two writ petitions by the partnership and the corporation. (*Ibid.*) The trial court awarded the wife $100,000 in attorney fees for which the partnership and the corporation were jointly and severally liable. (*Ibid.*)

On appeal, the partnership and the corporation conceded that Civil Code section 4370, the predecessor of section 2030,[6] the statute authorizing an award of attorney fees against a third party, could "be constitutionally applied to allow a spouse to recover pendente lite attorneys' fees against an unrelated third party," but only "where the spouse shows two things: (1) that the spouse would be substantially prejudiced in the

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[6] Section 2030 continued former Civil Code section 4370, subdivision (a) without change. (*Kevin Q. v. Lauren W.* (2011) 195 Cal.App.4th 633, 639, fn. 7.)

prosecution of his or her case in the absence of a pendente lite award of attorneys' fees and (2) the spouse seeking the fees is reasonably likely to prevail on his or her claims against the third party." (*In re Marriage of Siller, supra,* 187 Cal.App.3d at p. 50.) They further argued that the application of the statute to them was arbitrary, oppressive, and unfair in violation of their constitutional rights to substantive due process. (*Id.* at p. 51.) The Court of Appeal rejected the argument of the partnership and the corporation, holding that application of the attorney fee-shifting statute to them "was reasonably related to a proper legislative goal, was fundamentally fair, and did not violate the rights of third parties." (*Ibid.*) In rejecting the argument of the partnership and the corporation, the Court of Appeal acknowledged the concession of the partnership and the corporation that a third party could be liable for attorney fees in a marital dissolution proceeding, but did not hold that such liability depended on a showing by the spouse seeking attorney fees that she would be substantially prejudiced in the prosecution of her case in the absence of a pendente lite award of attorneys' fees and that she was reasonably likely to prevail on her claims against the third party. (*Ibid.*)

In its holding, the Court of Appeal addressed the claim by the partnership and the corporation that it was unfair to require them to pay the wife's attorney fees without considering the merits of the dispute and simply because they had money and she did not. (*In re Marriage of Siller, supra,* 187 Cal.App.3d at pp. 51-52.) The partnership and the corporation contended that the trial court erred in basing its fee award on the wife's successful opposition to the discovery motions and writ petitions; they argued that the wife had to "prevail on the merits of her claims or *show a likelihood she would prevail*." (*Id.* at p. 52, italics added.) The Court of Appeal disagreed. (*Ibid.*) It held that the trial court had not made the partnership and the corporation pay the wife's attorney fees simply because they had money and she did not. (*Ibid.*) Instead, it held that the trial court's attorney fees award was for the wife's successful opposition to the above described motions and writ petitions. (*Ibid.*) In so holding, the Court of Appeal did not state a requirement that a party must prevail on a particular motion in order to receive

attorney fees. (*Ibid.*) Instead, it merely rejected the contention that the trial court had based its attorney fees award on the relative financial position of the parties. (*Ibid.*)

The Court of Appeal further held, "it is immaterial that wife did not show she would ultimately prevail in the outcome of the litigation nor that she did not, in fact, prevail following trial. Given the fact that wife held record title to the 23 parcels of real property and that the trial court ultimately sustained her alter ego claim, wife's claims against third parties were not specious." (*In re Marriage of Siller*, *supra*, 187 Cal.App.3d at p. 53, fn. omitted

The Court of Appeal held that substantive due process had been satisfied by the wife's showing that she prevailed on the matters for which the trial court awarded attorney fees. (*In re Marriage of Siller, supra,* 187 Cal.App.3d at p. 53.) Unlike in *In re Marriage of Siller*, not all of the fees awarded in the instant case were for motions or proceedings in which Jeanette prevailed. Instead, some were for pleadings, motions and discovery. But so long as Jeanette was not required to establish a likelihood of prevailing on the ultimate issues, she should be entitled to attorney fees for steps taken to assert and prosecute her claims, even if some of them did not result in her prevailing on the matters for which the trial court was awarding attorney fees. Otherwise, without such a pendente lite award of attorney fees, Jeanette might be unable to pursue her claims. Accordingly, because there is no requirement that a party to a dissolution proceeding demonstrate a likelihood that he or she will prevail in his or her claim against a third party to be entitled to attorney fees pendente lite, Gunness's argument fails. (See *id.* at pp. 51-53.)

Gunness's claim that Jeanette was required to present a prima facie showing that Gunness had a connection to an issue in the dissolution proceeding and failed to satisfy that requirement is not correct. Paul contended in his complaint in the Mastro litigation that he invested $750,000 in the Beverly Hills Steakhouse. In his deposition in the Mastro litigation, Paul testified that he settled a $200,000 or $240,000 debt that DeLamos owed him for $130,000, and that $65,000 of that settlement also was invested in the restaurant. Paul further testified that Gunness signed the operating agreement for the restaurant. Paul explained, however, that he had an agreement with Mastro that he and

Mastro would be partners on a 25/75 percent basis in all California Mastro restaurants and that the "real agreement," i.e., his agreement with Mastro, was the operative agreement and not the operating agreement that Gunness signed. Yet, notwithstanding Paul's investments in the Beverly Hills Steakhouse and his partnership agreement with Mastro and notwithstanding Gunness's testimony that, in effect, she was a figurehead in the Mastro agreement, Gunness received a settlement of $7.25 million when the Mastro litigation was settled. In his opposition to Jeanette's attorney fees motion, Paul claimed that Gunness was the investor in the Beverly Hills Steakhouse, that he never received distributions or income from the restaurant, and that there was no agreement with Gunness that he would share in the restaurant investment or in any recovery from the Mastro litigation. Such evidence is sufficient to establish that there were "issues" in the dissolution proceeding that related to Gunness—that is, whether Paul invested in the Beverly Hills Steakhouse funds in which Jeanette had a community property interest and whether Paul fraudulently transferred his interest in the restaurant to Gunness. Even if a party must show that his or her claims are not "specious"[7] (see *In re Marriage of Siller, supra,* 187 Cal.App.3d at p. 53), Jeanette's claims here are not under the facts specious. To be entitled to attorney fees pendente lite under section 2030, Jeanette was not required to show that she was likely to prevail or a prima facie case that Gunness was connected to a dissolution proceeding issue.

## II. Jeanette Presented Sufficient Evidence Of Her Need For Gunness To Pay Her Attorney Fees And Of Gunness's Ability To Pay Those Fees To Justify An Award Of Attorney Fees Under Section 2030

Gunness contends that the trial court abused its discretion in awarding Jeanette attorney fees under section 2030 because there was insufficient evidence of Jeanette's need for Gunness to pay her attorney fees and of Gunness's ability to pay those attorney

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[7] A claim that is "specious" is "without substance in reality, if not frivolous" (*Gemini Aluminum Corp. v. California Custom Shapes, Inc.* (2002) 95 Cal.App.4th 1249, 1261) or "spurious" (Garner, A Dictionary of Modern Legal Usage (2d ed. 1995) 825).

fees in light of the trial court's finding that the parties' Income and Expense Declarations were insufficient and had credibility issues. The trial court did not abuse its discretion because sufficient evidence supported the award.

In support of her contention, Gunness claims that the trial court found that "all of the parties' Income and Expense Declarations were insufficient and had credibility issues." Despite that finding, Gunness argues, the trial court awarded Jeanette attorney fees. Even considering the credibility issues with the Income and Expense Declarations, however, there was sufficient evidence of Jeanette's need for Gunness to pay her attorney fees and Gunness's ability to pay those fees.

Jeanette's three 2010 Income and Expense Declarations in support of her motion for attorney fees stated assets not exceeding $6,300 and monthly income not exceeding $2,757. She had monthly expenses of around $2,500. Jeanette's 2007 and 2008 tax returns showed income of $400,000 and $150,255. At the time of the attorney fees motion, however, it appears that she was retired and disabled as her income, apart from spousal support, consisted of $941 in social security retirement benefits and $316 in social security disability benefits.

The trial court found Jeanette's July 18, 2010, Income and Expense Declaration to be "deficient" because Jeanette entered "NA" for various income and expense categories, she failed to provide a summary of her total assets, and she did not include a $61,000 IRA distribution in her monthly income calculation. Those deficiencies did not preclude the trial court from finding that Jeanette established a need for her attorney fees to be paid because Jeanette's counsel explained that the "NA" entry was meant to convey "zero" and offered to submit a revised Income and Expense Declaration, Jeanette's counsel represented that Jeanette had no investment income and her house was in foreclosure, and the trial court was aware of the $61,000 IRA distribution through Jeanette's 2009 tax return.

Although the trial court had some concerns about Jeanette's July 18, 2010, Income and Expense Declaration, it was far more concerned with the financial picture Gunness presented. The trial court repeatedly found Gunness's July 16, 2010, Income and

Expense Declaration, which showed monthly income of $2,960 and monthly expenses of $33,081, to be not credible. It also found that Gunness and Paul's tax returns reflected significant real estate holdings and a "retired couple with some very sophisticated investment activity." Jeanette's counsel noted that Gunness's 2008 tax return showed $84,000 in tax exempt interest which indicated an account containing as much as $4 million. The trial court agreed, saying, "Doesn't sound like somebody who is broke to me." The trial court was not bound to accept at face value or reject all of the financial information Gunness provided. It properly considered those parts of Gunness's financial information that it found credible—her tax returns, and disregarded those parts it found not credible—her Income and Expense Declaration. Based on the evidence before it, the trial court did not abuse its discretion in finding that Jeanette established a need to have Gunness pay for her attorney fees and that Gunness had an ability to pay those fees. (*In re Marriage of Sullivan, supra,* 37 Cal.3d at pp. 768-769.)

## III. The Trial Court's Attorney Fees Award

As discussed, the trial court did not abuse its discretion in finding that Jeanette established a need to have Gunness pay for her attorney fees and that Gunness had the ability to pay those fees. (*In re Marriage of Sullivan, supra,* 37 Cal.3d at pp. 768-769.) Gunness argues that attorney fees for certain work should not have been awarded and were, in any event, excessive.

Gunness claims that the trial court's attorney fees award of $131,750 was not an amount that was reasonably necessary for Jeanette to be represented at the pleading stage of the proceedings. The attorney fees Jeanette requested, Gunness claims, were excessive and disproportionate to the amount in controversy—Jeanette claimed she was entitled to $628,333.33 in omitted community property assets, yet requested $323,090 in attorney fees.

At the time that Jeanette's attorney fees motion was heard, section 2032 provided, in relevant part:

"(a) The court may make an award of attorney's fees and costs under Section 2030 or 2031 where the making of the award, and the amount of the award, are just and reasonable under the relative circumstances of the respective parties.

"(b) In determining what is just and reasonable under the relative circumstances, the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party's case adequately, taking into consideration, to the extent relevant, the circumstances of the respective parties described in Section 4320. The fact that the party requesting an award of attorney's fees and costs has resources from which the party could pay the party's own attorney's fees and costs is not itself a bar to an order that the other party pay part or all of the fees and costs requested. Financial resources are only one factor for the court to consider in determining how to apportion the overall cost of the litigation equitably between the parties under their relative circumstances."[8]

The "major factors" a trial court considers in fixing a reasonable attorney fees award are: "'the nature of the litigation, its difficulty, the amount involved, the skill required and the skill employed in handling the litigation, the attention given, the success of the attorney's efforts, his learning, his age, and his experience in the particular type of work demanded [citation]; the intricacies and importance of the litigation, the labor and the necessity for skilled legal training and ability in trying the cause, and the time consumed. [Citations.]' [Citations.] In addition, the financial circumstances of the paying spouse may be considered. [Citations.]" (*In re Marriage of Cueva* (1978) 86 Cal.App.3d 290, 296.) Gunness contends that there is no indication that the trial court considered any of the relevant factors in deciding on a reasonable attorney fees award. Instead, Gunness argues, the "trial court ordered fees for four categories of legal work, based on Jeanette's counsel's approximations of amounts of fees incurred or to be incurred." Those categories are as follows:

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**8** Subdivisions (a) and (b) were not amended in the 2010 amendments. (Stats. 2010, ch. 352, § 5.)

*A. Omitted Asset Motion*

Jeanette requested "approximately" $38,000 in attorney fees incurred in connection with her section 2556 omitted asset motion. The trial court awarded $30,000. Although she was a joined party to the proceeding, Gunness contends that the trial court erred in awarding Jeanette $30,000, or any amount, in attorney fees for Jeanette's omitted asset motion as Gunness was not a party to Paul and Jeanette's 1993 MSA. Gunness does not dispute the amount of the award, only Jeanette's entitlement to the award.

Under section 2556, a party to a marital dissolution proceeding may bring a motion to divide an asset that was omitted from the dissolution judgment. Section 2556 provides, in relevant part, "In a proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of the parties, the court has continuing jurisdiction to award community estate assets or community estate liabilities to the parties that have not been previously adjudicated by a judgment in the proceeding."

Jeanette's omitted asset motion concerned the $130,000 Paul received in satisfaction of a debt DeLamos owed. Jeanette argued in the motion that Paul testified in his deposition that he invested $65,000 of that sum in the Beverly Hills Steakhouse. Jeanette claimed a community property interest in the $130,000 and in the $7.25 million settlement proceeds from the Mastro litigation, which interests Paul did not tender or disclose to Jeanette. The motion stated that Gunness claimed ownership of the Mastro litigation settlement proceeds.

The purpose of Jeanette's omitted asset motion was to determine, in part, whether she had a community property interest in the Mastro litigation settlement. According to the motion, Gunness claimed that settlement was her property. Gunness's contention that she should not have to pay attorney fees in connection with Jeanette's omitted asset motion because she was not a party to Paul and Jeanette's MSA and thus could not have omitted any asset from that agreement misses the point. The purpose of an omitted asset motion is to determine whether an asset was omitted from a dissolution judgment and not to determine who omitted the asset. Gunness claimed an interest in part of the property at issue in Jeanette's omitted asset motion. There is no requirement that the third party was

a party to the proceedings at the time the legal services were rendered. (*In re Marriage of Siller, supra,* 187 Cal.App.3d at p. 53.) Accordingly, the trial court properly awarded Jeanette attorney fees from Gunness that Jeanette incurred in bringing the motion.

*B. Demurrer and Motion to Strike*

Jeanette appears to have requested "approximately" $78,500 for opposing Gunness's demurrer and motion to strike portions of Jeanette's complaint. The trial court awarded $30,000. Gunness contends that the award of $30,000 is improper because Jeanette could have avoided incurring the attorney fees by preparing proper pleadings. Moreover, Gunness argues, $30,000 in attorney fees is excessive for a total of 15 (actually 16) pages of points and authorities.

The trial court discounted Jeanette's attorney fees request by $48,500. The billing rate for Jeanette's attorney was $600 per hour.[9] The attorney fees award of $30,000 thus represents 50 hours of work for preparing oppositions to the demurrer and the motion to strike and for attending a hearing. As discussed above, an attorney fees motion is left to the trial court's sound discretion and will not be disturbed on appeal absent a clear showing of abuse. (*In re Marriage of Sullivan, supra,* 37 Cal.3d at pp. 768-769.) We will overturn an attorney fees order only if no judge could reasonably have made the same order. (*Id.* at p. 769.) Not prevailing is just one factor for consideration. (*In re Marriage of Cueva, supra,* 86 Cal.App.3d at p. 296.) A judge reasonably could have found that Jeanette's attorney worked 50 hours opposing Gunness's demurrer and motion to strike. Accordingly, the trial court acted within its discretion in awarding Jeanette $30,000 in attorney fees for opposing Gunness's demurrer and motion to strike.

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[9] Gunness does not contend that counsel's $600 hourly fee is unreasonable.

*C. Efforts to Take Gunness's Deposition and Defense of Gunness's Federal Court Declaratory Relief Action*

Jeanette requested "approximately" $45,750 in attorney fees incurred in attempting to take Gunness's deposition and in defending against Gunness's federal court declaratory relief action. The trial court awarded the full amount. We asked the parties to submit supplemental briefs addressing whether the claim for $45,750 is supported by substantial evidence.

Gunness contends that the trial court's award of attorney fees included an amount for taking Gunness's "future" deposition. Ignoring the fact that the trial court's ruling included attorney fees for defending against her federal court declaratory relief action, Gunness contends that an award of $45,750 in prospective fees to take her deposition is unreasonable on its face. Although Jeanette's initial attorney fees motion included in its request of $100,000 for future fees a request for 40 hours of attorney fees ($24,000) for taking Gunness's and Paul's depositions, her supplemental pleading regarding attorney fees requested fees for "efforts to take" Gunness's deposition along with fees for defending against Gunness's federal court declaratory relief action. As stated above, the trial court denied Jeanette's request for work to be performed.

Gunness has failed to meet her burden of demonstrating that the trial court erred in its award of the $45,750 in attorney fees. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610 [the appellant bears the burden of demonstrating error on appeal].) Gunness did not provide a transcript of a hearing that may have illuminated entries, which could have been related to the deposition. Gunness did not deal specifically with the entries in question in her opening brief or in response to this court's inquiries. She did not file a reply brief. Thus, Gunness never specified precisely why the amount awarded was erroneous. Accordingly, she has not shown prejudicial error.

*D. Joinder*

Jeanette requested "approximately" $26,000 in attorney fees incurred in joining Gunness to the dissolution proceeding, in connection with Gunness's disqualification of a

judge, and in meeting and conferring regarding five sets of written discovery served by Gunness. The trial court awarded the full amount requested, although it did not address the disqualification in its ruling.

Gunness mistakenly argues that the trial court awarded the whole of the sum of $26,000 for Jeanette's effort to join Gunness in the dissolution. As stated however, that sum was awarded both for fees incurred in joining Gunness and in meeting and conferring on five sets of written discovery.

Jeanette's joinder motion was about seven pages long. Paul filed objections to a declaration Jeanette filed in support of her joinder motion and a seven-page opposition to the motion. Jeanette's reply was 11 pages long. Jeanette prepared a two-page notice of ruling and a two-page order concerning her joinder motion. The hearing on the motion took place over two days. The record does not reflect the nature of the discovery dispute concerning the five sets of written discovery. At the billing rate of $600 per hour, the attorney fees award of $26,000 represents a little over 43 hours of work for preparing the joinder motion and reply, attending two hearings, preparing the notice of ruling and order, and meeting and conferring regarding five sets of written discovery. The trial court's award of $26,000 was not an abuse of discretion. (*In re Marriage of Sullivan*, *supra*, 37 Cal.3d at pp. 768-769.)

## IV. New Section 2030

As of January 1, 2011, section 2030, subdivision (a)(2) requires a trial court to make certain findings in awarding attorney fees. Prior to that time no such findings were required. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [trial court order presumed to be correct].) Section 2030, subdivision (a)(2) provides, in relevant part, "When a request for attorney's fees and costs is made, the court shall make findings on whether an award of attorney's fees and costs under this section is appropriate, whether there is a disparity in access to funds to retain counsel, and whether one party is able to

pay for legal representation of both parties." Gunness argues that section 4[10] makes 2030, subdivision (a)(2), retroactively applicable to Jeanette's attorney fees motion.[11]

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[10] Section 4 provides:

"(a) As used in this section:
"(1) 'New law' means either of the following, as the case may be:
"(A) The act that enacted this code.
"(B) The act that makes a change in this code, whether effectuated by amendment, addition, or repeal of a provision of this code.
"(2) 'Old law' means the applicable law in effect before the operative date of the new law.
"(3) 'Operative date' means the operative date of the new law.
"(b) This section governs the application of the new law except to the extent otherwise expressly provided in the new law.
"(c) Subject to the limitations provided in this section, the new law applies on the operative date to all matters governed by the new law, regardless of whether an event occurred or circumstance existed before, on, or after the operative date, including, but not limited to, commencement of a proceeding, making of an order, or taking of an action.
"(d) If a document or paper is filed before the operative date, the contents, execution, and notice thereof are governed by the old law and not by the new law; but subsequent proceedings taken after the operative date concerning the document or paper, including an objection or response, a hearing, an order, or other matter relating thereto is governed by the new law and not by the old law.
"(e) If an order is made before the operative date, or an action on an order is taken before the operative date, the validity of the order or action is governed by the old law and not by the new law. Nothing in this subdivision precludes proceedings after the operative date to modify an order made, or alter a course of action commenced, before the operative date to the extent proceedings for modification of an order or alteration of a course of action of that type are otherwise provided in the new law.
"(f) No person is liable for an action taken before the operative date that was proper at the time the action was taken, even though the action would be improper if taken on or after the operative date, and the person has no duty, as a result of the enactment of the new law, to take any step to alter the course of action or its consequences.
"(g) If the new law does not apply to a matter that occurred before the operative date, the old law continues to govern the matter notwithstanding its repeal or amendment by the new law.
"(h) If a party shows, and the court determines, that application of a particular provision of the new law or of the old law in the manner required by this section or by the new law would substantially interfere with the effective conduct of the proceedings or the rights of the parties or other interested persons in connection with an event that occurred

Because the trial court did not make the required findings, Gunness contends, the attorney fees award must be reversed.

Gunness's argument fails to consider subdivision (e) of section 4, which provides, "If an order is made before the operative date, or an action on an order is taken before the operative date, the validity of the order or action is governed by the old law and not by the new law. Nothing in this subdivision precludes proceedings after the operative date to modify an order made, or alter a course of action commenced, before the operative date to the extent proceedings for modification of an order or alteration of a course of action of that type are otherwise provided in the new law." Accordingly, the trial court's award of attorney fees to Jeanette was governed by the version of section 2030 in place at the time of the award and not the version that became effective on January 1, 2011.[12]

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or circumstance that existed before the operative date, the court may, notwithstanding this section or the new law, apply either the new law or the old law to the extent reasonably necessary to mitigate the substantial interference."

[11] Gunness's argument heading also references a new version of section 2032, but she does not discuss any changes to that section.

[12] We express no opinion on the merits of the litigation.

## DISPOSITION

The judgment is affirmed. Respondent Jeanette Bendetti shall recover her costs on appeal.

**CERTIFIED FOR PARTIAL PUBLICATION**

MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

In re Marriage of Paul and Jeanette Lee Bendetti
B228045

MOSK, J., Concurring

I agree with the majority opinion I prepared affirming the award of fees discussed in Section III C, because of Gunness's failure in this case to raise specific objections to particular amounts. In reviewing the timesheets, however, had I been the trial judge, I would not have awarded fees for at least $7,965 of the $45,750, for fees incurred in the federal action and/or to obtain discovery. (See *In re Manzy W.* (1997) 14 Cal.4th 1199, 1211 [separate opinion by author of majority opinion]; *Hawkins v. Superior Court* (1978) 22 Cal.3d 584, 595 [Justice concurring to majority opinion he authored said, ". . . I am taking the liberty of explaining why, if ours were not a collegial body and mine was the responsibility alone, I would apply a new and refined test"].)

The disputed $45,750 in attorney fees for efforts to take Gunness's deposition and for defending Gunness's federal court action concerned legal work performed on Jeanette's behalf for the period from May 1, 2008, to October 30, 2008

Some of the fees, although questionable, conceivably could have concerned the federal action and efforts to take the deposition. But, at a minimum, $7,965 can be ruled out absolutely *from that category*. For example, Gunness filed her federal court action on July 14, 2008. Jeanette claimed $8,085 in attorney fees for the period before Gunness filed her federal court action—i.e., the period from May 1, 2008, to July 14, 2008. Of those attorney fees, only $120 concerned efforts to take Gunness's deposition. Because Gunness had not yet filed her federal court action, none of the attorney fees for the period from May 1, 2008, to July 14, 2008, could have been incurred in defending the federal court action. Among those attorney fees claimed for that period was a claim for work

performed on June 26, 2008, in which Jeanette was billed $525 for time to organize pleadings and index the file in the Mastro litigation. Plainly that time did not concern "efforts to take" Gunness's deposition or to "defend" a federal action that had not yet been filed. Thus, for the period from May 1, 2008, to July 14, 2008, Jeanette was entitled to $120 for efforts to take Gunness's deposition, but was not entitled to any sum for defending Gunness's federal court action. I have just looked at the fees attributable to the specific category. Perhaps those fees are recoverable under some other category of work. In any event, Gunness did not make a sufficient showing of prejudicial error despite opportunities to do so.

MOSK, J.